SERVED: March 7, 2006

NTSB Order No. EA-5212

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 2nd day of March, 2006

MARION C. BLAKEY Administrator, Federal Aviation Administration, Complainant, v. STANMORE CAWTHON COOPER, Respondent.	Docket SE-17351

OPINION AND ORDER

Respondent appeals the Decisional Order of Administrative Law Judge Patrick G. Geraghty, issued on October, 24, 2005.[1] By that decision, the law judge granted the Administrator's Motion for Summary Judgment on her emergency revocation of respondent's airman and medical certificates for respondent's intentional

[1] A copy of the law judge's decision is attached.

falsification of four separate medical certificate applications.[2] We deny the appeal.

The Administrator's complaint alleged that respondent intentionally falsified medical certificate applications he submitted to the Federal Aviation Administration ("FAA") in 1998, 2000, 2002, and 2004, when (1) he represented that the only medication he was taking was Lipitor, even though he knew he was also taking medications to control his "HIV/AIDS-related infection," and (2) he represented that he had not ever had any neurological disorders, even though he knew that he had "peripheral neuropathy due to [his] HIV infection."[3]

In his answer to the complaint, respondent admitted that he filed the aforesaid medical certificate applications and, at the time, certified that they were complete and true. Respondent subsequently admitted that during the period he submitted the aforesaid medical certificate applications he knew that he was taking medications other than Lipitor, including prescription

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[2] On April 1, 2005, through counsel, respondent waived the expedited procedures normally applicable to emergency revocation proceedings under the Board's rules.

[3] The Administrator's complaint charged respondent with violating section 67.403(a)(1) of the Federal Aviation Regulations ("FARs"), which proscribes making a fraudulent or intentionally false statement on, among other things, any application for a medical certificate. The complaint also alleged that respondent failed to meet the general medical requirements for holding any class airman medical certificate, but the Administrator did not pursue lack of medical fitness issues in her Motion for Summary Judgment, and, therefore, the law judge did not address those issues and they are not an issue on this appeal. The law judge's decision sets forth the text of the Administrator's complaint, and the procedural history prior to the present appeal, in greater detail.

medications to control his HIV-related infection. See Respondent's Objections and Responses to Complainant's First Set of Discovery (June 3, 2005). Respondent also admitted that he learned in 1998 that the FAA was issuing special issuance medical certificates to certain HIV-infected airmen, but even though respondent could not at the time determine the FAA criteria for special issuance medical certification of HIV-infected airmen he nonetheless, without notifying the FAA of his condition, "believed that he was medically capable and qualified to operate an aircraft." See Respondent's Supplemental Responses to Complainant's First Set of Discovery (July 25, 2005). Furthermore, respondent admitted that after allegedly learning of the FAA's published criteria in 2000 or 2001 for special issuance medical certification of HIV-infected airmen he again, without notifying the FAA of his HIV-infection and medical status, determined, and continued to determine during the relevant time period, that his circumstances, "would not interfere with his safe operation of an aircraft." Id.[4]

The Administrator subsequently filed a Motion for Summary Judgment, arguing that respondent's answers to the complaint and subsequent admissions during discovery provided undisputable support for her charge that respondent intentionally falsified

[4] See also Respondent's Supplemental Responses to Complainant's First Set of Discovery (July 25, 2005) ("At no time since 1998 has Respondent ever operated an aircraft under any physical or mental disability or infirmity. In the event Respondent's medical condition had worsened to the extent that he would not have continued to meet special issuance criteria, he would have grounded himself[.]").

his medical applications between 1998 and 2004.[5] In support of her motion, the Administrator submitted copies of respondent's medical certificate applications from 1998, 2000, 2002, and 2004. In support of her motion, the Administrator also submitted a declaration by Dr. Stephen Griswold, FAA Deputy Regional Flight Surgeon for the Western-Pacific Region. Dr. Griswold stated that he reviewed respondent's medical certificate applications from 1998, 2000, 2002, and 2004, and compared them with, "medical records provided to my office by the Department of Transportation Office of Inspector General … including … the 3-page 'HIV Assessment Form' [signed by a physician and] dated July 2, 1996 … [and] the medical report [signed by a physician and] dated March 19, 1995[.]"[6] Dr. Griswold stated that he concluded these medical records reflected that respondent, "had peripheral neuropathy from June of 1994 through at least July of 1996," but he did not report this on his medical certificate applications. Dr. Griswold also stated that respondent's, "history of medications to control his HIV infection were also not disclosed on his medical applications," and, instead, respondent, "only disclosed his use of Lipitor which is not used to control HIV[.]" Finally, Dr. Griswold stated that the information about

[5] In her motion, the Administrator expressly reserved the lack of medical qualification charges for the hearing, should the law judge not grant summary judgment and revocation solely on the basis of the intentional falsification charge.

[6] Copies of these medical records were attached, respectively, as Exhibit A and Exhibit B to Dr. Griswold's affidavit in support of the Administrator's Motion for Summary Judgment.

respondent's diagnosis of peripheral neuropathy and his history of HIV-related medications, "is material to a proper determination of [respondent's] medical qualification to hold an airman medical certificate of any class."

Respondent opposed the Administrator's motion, not on the merits of the charge of intentional falsification, but, instead, by arguing that his, "medical condition was illegally obtained from the Social Security Administration ("SSA") in violation of the Privacy Act of 1974[7] and, is thus, tainted."[8]

In his decisional order, the law judge dismissed respondent's Privacy Act-based arguments, citing his previous ruling denying respondent's suppression motion that raised identical arguments. Turning to the unopposed merits of the Administrator's motion, the law judge concluded, correctly, that there was no material factual dispute and that the Administrator had proved the necessary elements of her intentional falsification charge. Accordingly, the law judge granted the

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[7] According to respondent's pleadings, in 1995 he submitted to the SSA medical information about his HIV status (including the medical records referred to by Dr. Griswold) while applying to SSA for disability benefits.

[8] Respondent also argued, in the alternative, that summary judgment as to the issue of sanction was not appropriate. In support of this argument, respondent only averred, essentially, that a hearing on the issue of sanction would permit the law judge to observe respondent's demeanor and decide, himself, whether it demonstrates that respondent lacks the care, judgment and responsibility required of a certificate holder. The law judge affirmed revocation on the basis of long-standing board precedent that revocation is the appropriate sanction for any instance of intentional falsification. Respondent does not argue on appeal that revocation is an improper sanction for intentional falsification.

Administrator's motion and, in doing so, affirmed the charge that respondent violated FAR section 67.403(a)(1) and upheld, on that basis, revocation of all airman and medical certificates held by respondent.

On appeal, respondent merely repeats his previous assertions arguing that the, "evidence relied upon … was obtained in violation of the Privacy Act of 1974[9] and should have been deemed inadmissible."[10] Significantly, however, we note that respondent does not contest the allegations that he intentionally falsified his medical applications, and, indeed, he has admitted that he did. The Administrator has filed a reply brief, urging us to uphold the law judge's decision.

Respondent's bald assertion of Privacy Act violations does not constitute evidence. At this stage in the proceedings, we focus on whether respondent has demonstrated error in the law judge's decision, specifically, his granting of the Administrator's Motion for Summary Judgment. Our rules specify that any opposition to a motion should include, "such affidavits or other evidence as that party desires to rely upon[.]" 49 C.F.R. 821.14(c). Because respondent neither disputed the factual underpinnings of the Administrator's charge of

[9] Respondent also argues, without supporting evidence, that his Constitutional rights were violated when SSA disclosed his medical records.

[10] Respondent also argues that he was not allowed to conduct sufficient discovery, but, as we will explain, this procedural argument is not, at this stage in the proceedings, separable from respondent's Privacy Act-based arguments.

intentional falsification nor attached any affidavits or other evidence to his opposition that raised a material factual dispute, we discern no error in the law judge's decision on the merits of the summary judgment motion.

Giving respondent the benefit of the doubt, however, respondent appears essentially to be arguing -- since he expends no effort on the merits of the Administrator's case -- that the law judge erred in denying his motions to compel discovery and to suppress "illegally obtained evidence."[11] Again, however, respondent provides virtually no cognizable basis for us to overturn the law judge's procedural rulings (much less his granting of the Administrator's motion).

In the case of his effort to compel certain discovery (an FAA deposition regarding how the FAA came into possession of the SSA records), respondent did not, as the law judge observed, even attempt to address the objections raised by counsel for the Administrator. The sufficiency of discovery responses, "is a matter committed to the discretion of our law judge's[.]" Administrator v. Evans, NTSB Order No. EA-4298 at 5 (1994). We discern no error, and respondent certainly demonstrates none, in the law judge's denial of respondent's motion to compel discovery.[12]

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[11] Respondent's opposition to the Administrator's Motion for Summary Judgment reiterates arguments, rejected by the law judge, raised in his motions to compel discovery and suppress evidence.

[12] Although it appears that much of the dispute over the circumstances surrounding the Administrator's acquisition of medical records from SSA might have evaporated with a more frank

Respondent also provided no affidavits or other evidence to support his argument that the Administrator illegally or improperly obtained SSA records. Instead, respondent appears content to rest his case on unsupported inferences of impropriety in the disclosure of the SSA records. More importantly, respondent provides no evidence for his assertion that the Privacy Act was violated by anyone, much less any FAA personnel.[13]

We also observe that even were respondent to have presented evidence to support his argument that the SSA records were illegally disclosed by SSA, he has not made any showing why the relief he requests (suppression, as tainted, of the evidence regarding his HIV-related medication and neuropathy) was required.[14] Under the terms of the Privacy Act, which prohibits disclosure, respondent's recourse for any actual violation would

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(…continued)
explanation from counsel for the Administrator, respondent had ample opportunity to meet the objections raised by the Administrator's counsel and to pursue further discovery based on the information on the subject that was provided. Respondent makes no showing that the law judge's discovery ruling constituted an abuse of discretion.

[13] Similarly, respondent provides no facts to support his assertion that the government violated his Constitutional rights.

[14] Although it is not a basis for our opinion here (which is properly based on respondent's failure to demonstrate to the law judge that there was a material factual dispute or, now on appeal, that the law judge erred in affirming summary judgment), we take judicial notice that another court similarly rejected respondent's Constitutional and Privacy Act-based arguments for suppression of his SSA medical records and related derivative evidence. See United States v. Cooper, Slip Copy, 2005 WL 3555713 (N.D.Cal.) (Dec. 28, 2005).

be against SSA, not the Administrator. Moreover, this is an administrative proceeding concerned with aviation safety, and, even if respondent might have some recourse under the statute against SSA, or even the Department of Transportation Office of Inspector General who purportedly provided the records to the Administrator, we think it would be inconsistent with our mandate to ignore the fact that respondent admits facts sufficient to sustain the charges of intentional falsification and revocation.

Simply put, respondent demonstrates no basis, nor do we discern any, for overturning the law judge's rulings on respondent's pre-hearing motions, or the Administrator's Motion for Summary Judgment. On the record before us, we are, therefore, constrained to affirm the law judge's ruling.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and

2. The law judge's decision, granting the Administrator's Motion for Summary Judgment and upholding the FAR section 67.403(a)(1) violation and the emergency revocation of all airman and medical certificates held by respondent, is affirmed.

ROSENKER, Acting Chairman, and ENGLEMAN CONNERS, HERSMAN, and HIGGINS, Members of the Board, concurred in the above opinion and order.

SERVED OCT. 24, 2005

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

* *

MARION C. BLAKEY, *
Administrator *
Federal Aviation Administration *
Complainant, *
v. * Docket No.: SE-17351
* JUDGE GERAGHTY
STANMORE C. COOPER, *
Respondent. *
*

* *

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DECISIONAL ORDER

This proceeding comes before the Board upon the Appeal of Stanmore Cawthon Cooper (hereinafter Respondent) from an Emergency Order of Revocation, herein the Complaint, which revoked Respondent's Private Pilot Certificate, the Airman Medical Certificate obtained by Respondent September 8, 2004, and any other airman certificate held by Respondent.

The Complaint was issued on behalf of the Administrator, Federal Aviation Administration (herein Complainant) through her Regional Counsel. The Complaint, as grounds for the action taken, alleges:

1. You are now the holder of Private Pilot Certificate No. 1608377, and an airman medical certificate issued on or about September 8, 2004.

2. On several occasions, you submitted applications for airman medical certificates with Aviation Medical Examiners, including:

a. September 8, 2004;

b. September 18, 2002;

c. September 19, 2000; and

d. September 8, 1998.

3. On each of the above-referenced applications, you certified that all of the statements and answers provided by you on the applications were complete and true to the best of your knowledge.

4. In part, as a result of your certifications on each of the above-referenced applications, you were issued an airman medical certificate.

5. On your applications referenced in paragraph 2 above, you represented that you only take the medication Lipitor.

6. Your representations that you did not use any medication, prescription or nonprescription, other than Lipitor was intentionally false in that you knew you were also taking medications to control your HIV/AIDS-related infection.

7. On your applications referenced in paragraph 2 above, you represented that you had not ever had or now have any neurological disorders.

8. Your denials on said applications that you had not ever had or now have any neurological disorders were intentionally false in that you knew you had peripheral neuropathy due to your HIV infection.

9. As a result of your health conditions referenced in paragraphs 6 and 8 above, the Federal Air Surgeon has determined that you do not meet the general medical standards to hold an airman medical certificate of any class.

As consequence, it is charged that Respondent has acted in regulatory violation of the provisions of Section 67.403(a)(1), Federal Aviation Regulations (FARs), in that Respondent made an intentionally false statement on an application for issuance of an airman medical certificate.[1]

[1] Section 67.403(a)(1), Federal Aviation Regulations (FARs), provides that: no person may make or cause to be made a fraudulent or intentionally false statement on any application for a medical certificate or on a request for any Authorization for Special Issuance of a Medical Certificate (Authorization) or Statement of Demonstrated Ability (SODA) under this Part.

Additionally, the Complaint alleged that Respondent fails to meet the general medical requirements for holding any class airman medical certificate.[2]

An Answer was submitted by Respondent and therein the allegations of Paragraphs 1-4 of the Complaint were admitted. Thereafter, in responses to Complainant's discovery requests, Respondent admitted:

1. That from September 8, 1998, until about September 8, 2004, he was taking other prescription medications in addition to Lipitor.
2. In the same time frame that he knew that he was taking other prescription medications than Lipitor to control his HIV-related infection.
3. That he took the medications to control his HIV-related infection from 1984 to the present time.[3]

And, in a supplemental discovery response, essentially admitted that in about 1998, Respondent made his own judgment or evaluation of his then medical status and determined that he was medically qualified to operate an aircraft. By that action, Respondent substituted his own evaluation of eligibility for airman medical qualification for that of the Federal Air Surgeon.[4]

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[2] Based on the foregoing facts and circumstances, the Administrator has determined that you are not eligible for medical certification pursuant to Sections 67.113(b)(1) and (2), 67.313(b)(1) and (2) of the Federal Aviation Regulations, 14 C.F.R. §§ 67.113(b)(1) and (2), 67.213(b)(1) and (2), 67.313(b)(1) and (2), in that you have an organic, functional, or structural disease, defect, or limitation that the Federal Air Surgeon, based on the case history and appropriate, qualified medical judgment relating to the condition involved finds (1) makes you unable to safely perform the duties or exercise the privileges of the airman certificate applied for or held; and (2) may reasonably be expected, for the maximum duration of the airman medical certificate applied for or held, to make you unable to perform those duties or exercise those privileges.

[3] Discovery Responses from Respondent dated June 3, 2005.

[4] Respondent's Supplemental Discovery Response July 25, 2005.

Complainant has filed a Motion for Summary Judgment on grounds that on the record there is no genuine issue of material fact. Attached to that Motion are supporting copies of Respondent's FAA applications, a Declaration and medical records/evaluation.

Although, as noted above, the Complaint charges not only regulatory violation of Section 67.403(a)(1) FARs, but that Respondent fails to meet the pertinent standards of Part 67, FARs, Complainant, in her Motion, limits or focuses solely upon the allegation of intentional falsification. Accordingly, the resolution of the pending Motion is directed to the question of whether or not summary judgment is warranted solely on that regulatory charge.

Respondent has filed a reply in opposition to Complainant's Motion. There were no supporting affidavits or documentation attached to that reply. Basically, in that response, Respondent does not contest the validity of the allegations and evidence in support thereof; rather, it is argued that the evidence supporting those allegations is tainted and thus should be deemed inadmissible. Respondent rests that that argument on an alleged violation of the Privacy Act of 1974[5] by both FAA and the Social Security Administration (SSA).

Respondent's arguments on suppression of evidence were submitted separately in an appropriate Motion which was opposed by Complainant. The Parties' arguments were considered and by Order entered October 17, 2005, Respondent's Motion to Suppress was denied. The ruling made in that Order is controlling on the identical argument raised by Respondent in his opposition to Complainant's Motion for Summary Judgment.

Summary Judgment is warranted where the record in the proceeding shows that there does not exist any genuine issue of material fact in dispute. Further, where such Motion is supported by documentation as would be admissible at trial—the

[5] 5 U.S.C. 552 and subparts thereof.

documentation attached to Complainant's Motion is such—the opposing party may not rest upon mere allegations but must set forth specific facts demonstrating a genuine issue of material fact exists as would require trial to resolve.

As noted above, Complainant's Motion focuses solely upon the charge of Respondent's alleged violation of Section 67.403(a)(1) FARs; i.e., the charge that Respondent made an intentional false statement on applications for airman medical certification. To support a charge of intentional falsification, three (3) elements must be established: (1) a fake statement, (b) as to a material fact, (c) made with knowledge of its falsity.

Herein, the record clearly demonstrates that Respondent made incomplete, fake statements on his applications for issuance of medical certification. Those false statements were material as they influence the FAA's decision on Respondent's medical eligibility and issuance of certification. The final element is the requirement to demonstrate a showing of scienter on the part of Respondent, that is, Respondent knew his statements were false and intentionally made. To meet that standard, the evidence of scienter must be sufficient as to preclude an explanation of the entries other than intentional falsification.

On the Respondent's admissions, it is indisputable that Respondent knew that he was making incomplete, fake statements on the applications and that he was substituting his own evaluation of eligibility for issuance of certification over that of the FAA's Federal Air Surgeon. I conclude, therefore, that the burden of proof on a showing of scienter is clearly met by Complainant. Respondent has not submitted any evidence as would dispute the factual allegations of the Complaint. On this record, I find that the preponderance of evidence requires the conclusion, which I reach, that on each of the applications cited in Paragraph 2 of the Complaint, Respondent acted in violation of Section 67.403(a)(1) FARs.

Respondent argues that, even if summary judgment is found on the regulatory charge, nevertheless, Hearing should be held on the issue of sanction. I

disagree as the Board repeatedly held that a finding of intentional falsification—even one instance thereof—warrants the imposition of the sanction of revocation. Section 67.403(b)(1) FARs provides, and the Board has so held, for a violation the provisions of Section 67.403(a)(1) FARs, will support revocation of all airman and medical certificates held by the offending airman, herein Respondent.

I conclude, therefore, that on the repeated falsifications any and all airman and medical certificates held by Respondent should be revoked.

Ultimately, I find and conclude that as, on the record, it is demonstrated that there does not exist any genuine issue of material fact in dispute, and as the question of appropriate sanction is clearly resolved on Board precedent, Complainant's Motion for Summary Judgment must be and hereby is granted.

SO ORDERED.

ENTERED this 24th day of October 2005 at Denver, Colorado.

PATRICK G. GERAGHTY
ADMINISTRATIVE LAW JUDGE